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**MEMORANDUM FOR:** Rick Ollendick, Team Coordinator  
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**FROM:** Matthew J. Fritz, Associate Area Counsel (LMSB)  
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**SUBJECT:** [REDACTED]  
EIN: [REDACTED]  
Advisory Opinion on a Form 872 Executed by the Parent  
Corporation of a Consolidated Group

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

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By an email dated December 19, 2000 that was supplemented with additional documentation on January 11, 2001, you requested assistance on an identical issue arising with respect to several subsidiaries of [REDACTED].

#### ISSUE

1. May the Service request information pertaining to the tax liabilities of the subsidiaries of parent corporations when the taxpayers raise affirmative defenses?
2. Has the statutory period of limitations for the subsidiary corporations expired where the parents filed consolidated returns and executed consents extending the statutory period of limitations?

#### CONCLUSION

1. Yes. Under I.R.C. § 7602(a)(1), the Service is authorized to examine any books, papers, records, or other data which may be relevant to determining the liability of any person for any internal revenue tax.
2. When a consolidated tax return is filed, the parent corporation acts as the agent for its subsidiaries. The parent corporations executed consents extending the periods of limitations. Even if the statutory periods of limitations have expired for the subsidiaries, they have not expired for the parent corporations.

#### FACTS

The facts as we understand them follow: [REDACTED]  
[REDACTED] (" [REDACTED] ") filed a consolidated tax return for itself and its subsidiaries for the tax year ending [REDACTED]. That return was signed by [REDACTED], Vice President of [REDACTED].

On [REDACTED], [REDACTED] (" [REDACTED] ") acquired [REDACTED] % of the stock of [REDACTED]. [REDACTED] of the subsidiaries of [REDACTED] filed separate federal returns for the short-period [REDACTED] to [REDACTED]. [REDACTED] and its remaining subsidiaries were included in the consolidated tax return of [REDACTED] (" [REDACTED] "), the parent of [REDACTED], for the short period [REDACTED] to [REDACTED]. After

██████████, ██████████ and its subsidiaries became the direct subsidiaries of ██████████.

On ██████████, ██████████, Vice President of ██████████, signed a Form 872, Consent to Extend the Time to Assess Tax, extending the statutory period of limitations for assessment for the tax year ending ██████████ until ██████████. The name of the taxpayer on the Form 872 was "██████████ ██████████."

██████████ filed consolidated tax returns for itself and its subsidiaries for the tax years ending ██████████ and ██████████. These returns were signed by ██████████, Senior Vice-President of Taxes for ██████████.

On ██████████, ██████████ signed a Form 872, Consent to Extend the Time to Assess Tax, extending the statutory period of limitations for assessment for the tax year ending ██████████ until ██████████. On ██████████, ██████████ signed a Form 872, Consent to Extend the Time to Assess Tax, extending the statutory period of limitations for assessment for the tax years ending ██████████ and ██████████ until ██████████. The name of the taxpayer on the earlier Form 872 was "██████████" and on the latter Form 872 was "██████████."

██████████ (fka ██████████) ("██████████") was controlled by ██████████ but filed consolidated tax returns for itself and its subsidiaries for the tax years ending ██████████ and December 31, 1996. These returns were signed by ██████████, Vice President of Tax for ██████████.

On ██████████, ██████████, Senior Vice-President of Taxes for ██████████, signed a Form 872, Consent to Extend the Time to Assess Tax, extending the statutory period of limitations for assessment for the tax year ending ██████████ until ██████████. On ██████████, ██████████ signed a Form 872, Consent to Extend the Time to Assess Tax, extending the statutory period of limitations for assessment for the tax years ending ██████████ and ██████████ until ██████████. The name of the taxpayer on both forms was "██████████."

██████████, ██████████ and ██████████ have refused to respond to Information Document Requests for the taxable years ██████████ and ██████████ concerning

their subsidiaries. The corporations' refusals to comply with the Information Document Requests are based solely on the names of the taxpayers shown on the Forms 872. The Forms 872 that extended the respective statutory periods of limitations for assessment listed the parent corporations and do not include the language "and subsidiaries." The taxpayers argue that the statutory periods of limitations for assessment of the subsidiaries' taxes have expired.

#### ANALYSIS

##### **I. Authority of the Internal Revenue Service to Examine Records, Documents, Books, and Other Data**

I.R.C. § 7602 grants the Internal Revenue Service broad examination authority to facilitate administration and enforcement of the internal revenue laws. Specifically, section 7602(a)(1) authorizes the Service to examine any books, papers, records, or other data which may be material or relevant to certain specifically identified purposes. The purposes identified include: ascertaining the correctness of a return; making a return where none was made; determining the liability of any person for any internal revenue tax; and collecting any internal revenue tax liability. I.R.C. § 7602(a).

The revenue agent's investigation of the parent corporations' subsidiaries falls within the purpose of ascertaining the correctness of the consolidated returns filed by the parent corporations, as well as determining the liability of the parent corporations for income taxes. The taxpayers have refused to comply with the revenue agent's requests for information about their subsidiaries relying on an affirmative defense. The statute of limitations is an affirmative defense and not a jurisdictional issue. Davenport Recycling Associates v. Commissioner, 220 F.3d 1255, 1259-1260 (11th Cir. 2000), aff'g T.C. Memo 1998-347 (in deficiency cases, assertion of the bar of the statute of limitations is an affirmative defense, not a jurisdictional question); Columbia Building, Ltd. v. Commissioner, 98 T.C. 607, 611 (1992). Even if the three year statute has expired that does not totally prohibit the right of the I.R.S. to investigate tax years pursuant to the purposes delineated in section 7602.<sup>1</sup> See e.g., Universal Life Church v.

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<sup>1</sup> Although there is no reason to believe it is true in this case, there is a potential that one of the numerous exceptions contained in section 6501, such as section 6501(c) which

United States, 573 F. Supp. 181 (W.D. Va. 1983). An affirmative defense such as the statute of limitations does not bar the investigative powers of the Service. United States v. Powell, 379 U.S. 48 (1964); United States v. Esposito, 80-2 USTC ¶ 9634 (N.D. Ill. 1980).

In Powell, the statute of limitations for the tax year in question had already expired, and therefore the tax investigation could be productive in terms of tax liability only if the Commissioner could prove fraud. The taxpayer contended that the summons should not be enforced unless the Commissioner could establish probable cause for suspecting fraud, but the Court emphatically rejected that contention. The Court explained that there was no reason for believing that "Congress intended the Courts to oversee the Commissioner's determinations to investigate." Id. at 56. See also United States v. Administrative Enterprises, 46 F.3d 670 (1995), which held that IRS summonses do not expire and "no statute of limitations applies to a petition to enforce a summons."

It is not necessary for the revenue agent to first issue a summons before examining records pertaining to the subsidiaries. The Service's authority to examine books, papers, records, or other data exists separately from the Service's authority to summon such records under I.R.C. § 7602(a)(2). See I.R.C. § 7609(j) (nothing in section 7609 is intended to limit the IRS's ability to obtain information other than by summons through formal and informal procedures authorized by sections 7601 and 7602). In fact, it is the Service's policy that information such as that sought by the revenue agent should be obtained informally, without serving a summons. I.R.M. 109.1 Summons Handbook § 1.4 (04/30/1999). However, if the records are not produced voluntarily, the Service can compel compliance by summoning the records and, if needed, the return preparers' testimony.

If the taxpayer fails or continues to refuse to comply with the revenue agent's requests, the Service should consider the issuance of a formal administrative summons to obtain such

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eliminates the effect of the statute in the event of false or fraudulent returns or 6501(e) which provides there is a statute of limitations of 6 years when there is a substantial understatement of income in excess of 25% of the amount of gross income reported on the return, would be applicable in place of the regular three year period.

information.<sup>2</sup> See I.R.C. §§ 7602(a)(2) and (3). A summons would be appropriate in the following situations<sup>3</sup>:

- (1) No records are made available to permit an adequate examination within a reasonable period of time;
- (2) The records submitted are known or suspected to be incomplete and the examiner believes that additional records containing relevant and material matter may be in the possession of the taxpayer or a third party;
- (3) The examiner believes that additional relevant details are being withheld because of an adverse impact on the taxpayer;
- (4) The taxpayer indicated that it is withholding substantial records or information for subsequent use on administrative appeal or after issuance of a deficiency notice; and
- (5) The examiner is in doubt as to the availability of pertinent records, and wishes to obtain oral testimony as to what records exist and their location.

## II. Statutory Period of Limitations for Consolidated Return

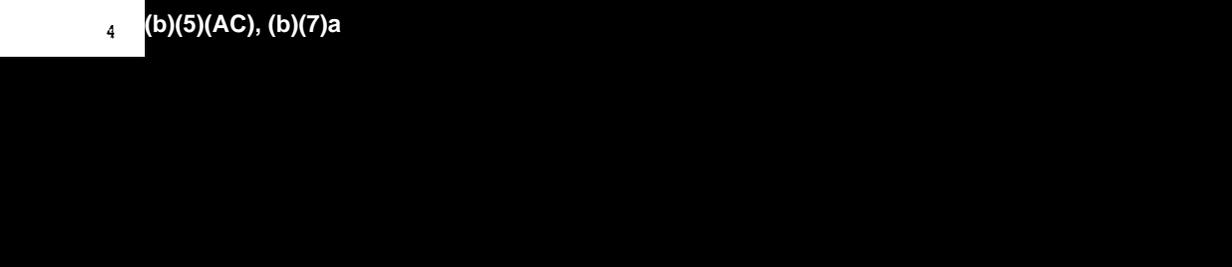
Section 6501(a) sets forth the general rule that an income tax must be assessed within 3 years after the tax return for the particular year is filed. Before the time for assessment of any tax expires, the Internal Revenue Service and the taxpayer may agree to extend the period of limitations for assessment. I.R.C. § 6501(b)(4). Form 872, Consent to Extend the Time to Assess Tax, is used to extend the period of assessment to a specific date.<sup>4</sup> This period may be extended by subsequent written

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<sup>2</sup> Area Counsel would be more than willing to offer its assistance in preparation of the summons.

<sup>3</sup> See I.R.M. 109.1 Summons Handbook § 1.4 (04/30/1999).

<sup>4</sup> (b)(5)(AC), (b)(7)a



agreements made within that period. Treas. Reg. § 301.6501(c)-(1)(d).

**A. The Parent Corporation is the Agent for Members of the Affiliated Group**

In lieu of filing separate returns, an affiliated group of corporations can file a consolidated return, and be taxed as a single unit. See I.R.C. § 1501. In the consolidated return context, the common parent corporation is deemed, for almost all purposes, to be the agent for all members of the affiliated group.<sup>5</sup> The common parent has the authority to act for, make elections for, or represent the group in matters relating to the tax liability of the group. Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985). No subsidiary has the authority to act for or to represent itself in any such matter.<sup>6</sup> Treas. Reg. § 1.1502-77(a). Under the consolidated regulations, the Commissioner needs to deal only with the common parent in connection with any matter involving the tax of the group or the returns filed during a consolidated return period. See Treas. Reg. § 1.1502-77(a); Brock v. Commissioner, T.C. Memo. 1982-335. Consequently, one Form 872 may be obtained to cover a parent corporation and any or all of its subsidiary corporations.

Rev. Proc. 72-38, 1972-2 C.B. 813 sets forth the requirements for a single consent when the parent corporation and its subsidiary corporations file separate returns.<sup>7</sup> Where, as

(b)(5)(AC), (b)(7)a

<sup>5</sup> The common parent corporation is not the agent for the purposes of filing consents to the regulations (Form 1122) and the making of an election to be treated as a DISC under Treas. Reg. § 1.992-2 or be treated as a possession corporation under I.R.C. § 936. These exceptions do not apply in this case.

<sup>6</sup> However, the district director (or the appropriate official under the reorganization) may, upon notifying the common parent, deal directly with any member of the group itself in respect to its liability, in which event such member shall have full authority to act for itself. Treas. Reg. § 1.1502-77(a). These circumstances did not arise in this case.

<sup>7</sup> Rev. Proc. 72-38 was modified by Rev. Proc. 82-6, 1982-1 C.B. 409 which clarified that no fixed percentage of ownership was required by the parent corporation in order to execute a Form 872 covering the parent corporation and any or all of its

here, a parent corporation and its subsidiary corporations join in the filing of a consolidated return, Treas. Reg. § 1.1502-77(c) contains the relevant procedures which the Service should follow. See Alumax, Inc. v. Commissioner, 109 T.C. 133 (1997), aff'd, 165 F.3d 822 (11<sup>th</sup> Cir. 1999).

Treas. Reg. § 1.1502-77(c) provides that, unless the district director (or the appropriate official under the reorganization) agrees to the contrary, waivers of the statutory period of limitations for consolidated return periods given by the parent corporation are deemed to be applicable, not only to each corporation which was a member of the affiliated group, but also to each corporation whose income was included in the consolidated return. See also Lone Star Life Ins. Co. v. Commissioner, T.C. Memo. 1997-465.

In your case, the waivers of the parent corporations for the years under examination are deemed to be applicable to each corporation who was a member of the affiliated group since there was no agreement to the contrary by the district director (or the appropriate official under the reorganization). The failure to include "and subsidiaries" on the Forms 872 does not negate the waiver of the parent corporation who acted as the agent for the consolidated group. Furthermore, the Tax Court has held that a waiver is valid where there is a slight error in the corporate name, but not of such a nature as to be misleading. See Rauh v. Commissioner, 22 B.T.A. 662 (1931).

**B. Parent Remains Liable for the Entire Consolidated Tax of the Affiliated Group**

Where corporate taxpayers are affiliated and report on a consolidated basis, the income of the group is determined as a whole and the tax computed on that sum. See Washburn Wire Co. v. Commissioner, 26 B.T.A. 1146 (1932). Because the tax is computed based on the sum of the group's incomes, each member of the affiliated group is liable for the entire consolidated tax of the group, including any deficiencies assessed against the group for the consolidated return period. Treas. Reg. § 1.1502-6(a). The consolidated tax may be paid by the corporations separately on the basis of income of each corporation or by any numbers as they may agree. However, no agreement among the members of the group as to their respective shares or portions of the consolidated tax

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subsidiary corporations.

liability will prevent the Commissioner from imposing such liability upon any member he chooses. Treas. Reg. § 1.1502-6(c).

In the years at issue, [REDACTED], [REDACTED] and [REDACTED] each filed consolidated tax returns. Each member of the affiliated group is liable for the entire consolidated tax of the group, including any deficiencies assessed against the group for the consolidated return period. In the respective tax years, each parent corporation remains liable for the tax liability of the entire consolidated group as long as the statutory periods of limitations for assessment have not lapsed. Each parent corporation executed Forms 872 prior to the expiration of the respective statutory periods of limitations for the years at issue. Therefore, even if the statutory periods of limitations have expired with respect to the subsidiaries (which we do not believe to be the case), the periods have not expired with respect to the parent corporations who executed consents and remain liable for the entire consolidated tax of the group, including any deficiencies assessed against the group for the consolidated return period.

This memorandum is subject to post-review by the Office of Chief Counsel, under CCDM (35)3(19)4. We will inform you of any modification of this advice.

If you have any questions, please contact the undersigned at (513) 684-2152.

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(Signed) GARY R. SHULER, JR.

By: \_\_\_\_\_  
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